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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 **GAMETEK LLC,**

12 **Plaintiff,**

13 **vs.**
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15 **FACEBOOK, INC.; et al.,**

16 **Defendants.**
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CASE NO. 12-CV-501 BEN (RBB)

ORDER:

**(1) DENYING BIG VIKING
GAMES' MOTION TO STRIKE
UNDISCLOSED
CONSTRUCTION AND
EXTRINSIC EVIDENCE**
[Docket No. 181]

**(2) DENYING BIG VIKING
GAMES' MOTION TO STRIKE
PORTION OF GAMETEK LLC'S
RESPONSIVE CLAIM
CONSTRUCTION BRIEF**
[Docket No. 187]

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21 Presently before the Court is Defendant Big Viking Games, Inc.'s (1) Motion to
22 Strike Undisclosed Construction and Extrinsic Evidence (Docket No. 181) and (2)
23 Motion to Strike Portion of Plaintiff GameTek LLC's Responsive Claim Construction
24 Brief (Docket No. 187). For the reasons stated below, both Motions are **DENIED**.

25 **I. MOTION TO STRIKE UNDISCLOSED CONSTRUCTION AND EXTRINSIC**
26 **EVIDENCE**

27 Big Viking Games moves to strike GameTek's construction of "commitment of
28 consideration" and the dictionary definitions GameTek seeks to rely on for the claim

1 phrases “set of demographics” and “commitment of consideration.”

2 The July 13, 2013 Scheduling Order sets forth the deadlines for disclosing
3 proposed claim constructions and extrinsic evidence. (Docket No. 129.) On
4 September 6, 2012, the Court modified the deadline for disclosure of proposed claim
5 constructions and extrinsic evidence. (Docket Nos. 141, 151.) On October 15, 2012,
6 the parties exchanged preliminary proposed constructions and extrinsic evidence.
7 (Bekier Decl. [Docket No. 181-2] ¶ 2.) On November 5, 2012, the parties exchanged
8 responsive proposed constructions and extrinsic evidence. (*Id.* ¶ 3.) On November 19,
9 2012, after meeting and conferring, the parties filed their joint claim construction chart,
10 worksheet, and hearing statement. (Docket Nos. 164, 165, 166.)

11 On January 13, 2013, the day before the opening claim construction briefs were
12 due, GameTek proposed a different construction, along with three new extrinsic
13 evidence dictionary definitions, for the phrase “commitment of consideration.” (Bekier
14 Decl., Exh. A [Docket No. 181-3].) In addition, GameTek disclosed three new
15 extrinsic evidence dictionary definitions for the phrase “set of demographics.” (*Id.*,
16 Exh. B [Docket No. 181-4].) Big Viking Games moves to strike GameTek’s new
17 proposed construction and extrinsic evidence, arguing that it was unfairly prejudiced
18 in its ability to prepare its opening claim construction brief.

19 Under Patent Local Rule 4.1, parties are required to exchange “preliminary
20 proposed construction[s] of each claim term, phrase, or clause which the parties have
21 identified for claim construction purposes,” and “provide a preliminary identification
22 of extrinsic evidence, including without limitation, dictionary definitions”
23 PATENT L.R. 4.1.a & b. The parties then are required to provide responsive claim
24 constructions “setting forth the responding party’s alternate construction” and
25 corresponding extrinsic evidence. PATENT L.R. 4.1.c & d.

26 Under Federal Rule of Civil Procedure 37, however, when a party moves for an
27 order compelling disclosure or discovery, “[t]he motion must include a certification
28 that the movant has in good faith conferred or attempted to confer with the person or

1 party failing to make disclosure or discovery in an effort to obtain it without court
 2 action.” FED. R. CIV. P. 37(a)(1). Because this is a discovery and disclosure dispute,
 3 Rule 37 applies here. *See Pulse Eng’g, Inc. v. Mascon, Inc.*, No. 08-CV-0595, 2009
 4 WL 250058, at *3 (S.D. Cal. Feb. 3, 2009).

5 GameTek argues that Big Viking Games never requested a meet and confer to
 6 discuss the alleged disclosure deficiencies, as required by Federal Rule of Civil
 7 Procedure 37. Big Viking Games does not assert that it requested the required meet
 8 and confer, nor does it otherwise address this argument by GameTek. Because Big
 9 Viking Games was obligated to make a good faith effort to meet and confer to resolve
 10 this dispute before bringing the present motion, Big Viking Games’ Motion to Strike
 11 Undisclosed Construction and Extrinsic Evidence is **DENIED**.

12 **II. MOTION TO STRIKE PORTION OF RESPONSIVE CLAIM CONSTRUCTION** 13 **BRIEF**

14 Big Viking Games moves to strike GameTek’s arguments regarding the
 15 construction of the term “ordering” in GameTek’s Responsive Claim Construction
 16 Brief.

17 In its Opening Claim Construction Brief, GameTek briefly mentioned the term
 18 “ordering,” and indicated that this term was not in dispute:

19 The remaining disputed phrases—“ordering the at least one selected
 20 game object without *interrupting* the *gaming action* of the at least one
 21 user” . . . —need no further construction beyond *gaming action* and
 22 *interrupting*. With each of these phrases, Plaintiff and Defendant are
 23 merely repeating their positions with respect to *gaming action*,
 24 *interrupting*, and *purchasing*. None of the other words such as
 “ordering” . . . appear to be in dispute, nor has either side requested
 construction of those words since they have an easily understandable
 ordinary meaning.

25 (Docket No. 178, at 22-23.) Big Viking Games provided a construction for “ordering”
 26 in its Opening Claim Construction Brief. (Docket No. 177, at 17-19.)

27 The parties filed responsive claim construction briefs on January 28, 2013.
 28 (Docket Nos. 180, 183.) GameTek’s Responsive Claim Construction Brief raised

1 arguments against Big Viking Games' proposed construction for "ordering." (Docket
2 No. 183, at 20-22.) Big Viking Games moves to strike GameTek's arguments
3 regarding the construction of "ordering" in its Responsive Claim Construction Brief,
4 arguing that it has been prejudiced by GameTek's failure to put forth its affirmative
5 position in its Opening Claim Construction Brief.

6 Under the Patent Local Rules, parties are required to "simultaneously file and
7 serve opening briefs and any evidence supporting their claim construction." PATENT
8 L.R. 4.4(a). Subsequently, parties are to "simultaneously file and serve briefs
9 responsive to the opposing party's opening brief and any evidence directly rebutting
10 the supporting evidence contained in the opposing party's opening brief." PATENT L.R.
11 4.4(b).

12 Here, although GameTek did not advance an affirmative proposed construction
13 for "ordering" in its Opening Claim Construction Brief, GameTek simply responds to
14 Big Viking Games' proposed construction in its Responsive Claim Construction Brief.
15 To the extent that GameTek advanced new arguments that Big Viking Games has not
16 had an opportunity to respond to, Big Viking Games will have an opportunity to
17 address these arguments at the Claim Construction Hearing.

18 Accordingly, Big Viking Games' Motion to Strike Portion of Gametek LLC's
19 Responsive Claim Construction Brief is **DENIED**.

20 **IT IS SO ORDERED.**

21
22 DATED: April 7, 2013


23 HON. ROGER T. BENITEZ
24 United States District Judge
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